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Supreme Court, U.S.
FILED
SEP 11 2003
OFFICE OF THE CLERK

No. 02-1632

In The

Supreme Court of the United States

RALPH HOWARD BLAKELY, JR.,

Petitioner,

v.

STATE OF WASHINGTON,

Respondent.

On Petition For A Writ Of Certiorari To The Washington Court Of Appeals, Division III

RESPONDENT'S BRIEF IN OPPOSITION

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29 pp

QUESTIONS PRESENTED FOR REVIEW (RESTATED)

Whether the statutory maximum sentence authorized by guilty plea or verdict is that set forth in WASH. REV. CODE § 9A.20.021 (2002) as interpreted by the Washington Supreme Court in *State v. Gore*, 143 Wash.2d 288, 311-15, 21 P.3d 262 (2001), such that sentencing "within [this] authorized range does not implicate the indictment, jury-trial, and reasonable-doubt components of the Fifth and Sixth Amendment" as set forth in *Harris v. United States*, 536 U.S. 545, 558, 122 S.Ct. 2406, 2415, 153 L.Ed.2d 524 (2002)?

Whether the factors set forth in WASH. REV. CODE § 9.94A.535 (2002) and upon which the trial court relied in imposing an exceptional sentence are properly sentencing factors to be found by a judge or offense elements to be found by the jury? *Harris v. United States*, 536 U.S. 545, 557-68, 122 S.Ct. 2406, 2414-20, 153 L.Ed.2d 524 (2002).

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CITATION TO OPINION BELOW

The opinion of the Washington Court of Appeals is reported as *State v. Blakely*, 111 Wash. App. 851, 47 P.2d 149 (2002). The order of the Washington Supreme Court denying discretionary review of that decision is reported as *State v. Blakely*, 148 Wash.2d 1010, 62 P.3d 889 (2003).

JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a), except as argued herein.

CONSTITUTIONAL PROVISIONS INVOLVED

The Petitioner contends that the issues presented in this case involve the Sixth and Fourteenth Amendments to the United States Constitution.

STATEMENT OF THE CASE AND FACTS

A. FACTS[1]

In July 1995, the Petitioner Ralph Howard Blakely broke into the Spokane, Washington home of his estranged wife Yolanda. VRP (Verbatim Report of Proceedings) 607-08. He held her by the wrists, twisting them tightly, and

[1] While this Court's review regards purely legal issues, the Respondent presents the facts of the crime pursuant to S. Ct. R. 15(2) in order to address the errors and mischaracterizations in the petition.

threatened to poison her and the children with cyanide or, alternately, to kidnap the children. VRP 607-08. Soon after that incident, Mrs. Blakely obtained a restraining order against her husband and filed for divorce. VRP 601, 609-11.

While going through divorce and trust litigation, Petitioner Howard Ralph Blakely built a coffin-like box at his home in Montana, tailored to his wife's size. CP (Clerk's Papers) 5, VRP 641-44. On October 26, 1998, he drove to his wife's farm in Grant County, Washington in violation of restraining orders. VRP 607-15. He found her at the mailbox, knocked her to the ground, knelt on her chest, and bound her with duct tape so tightly that her wrists turned blue. VRP 631. Mr. Blakely covered his tracks in the gravel before carrying his bound wife through the orchard. VRP 632-35, 735. He dropped her on her shoulder, and then forced her to walk to his pickup truck. VRP 632-41. Reciting the knives, guns, and ammunition in his possession, Mr. Blakely threatened to kill his wife and himself. VRP 640-41. He also threatened to hire someone to kill Yolanda and Ralphy if she did not drop the trust litigation. VRP 640. Holding a knife to her, Mr. Blakely forced his wife to climb over the tailgate of his pickup, under the canopy, and into the homemade coffin, which he then latched shut. VRP 641-46. The coffin's length was only three inches longer than Mrs. Blakely's standing height. VRP 641-44. After driving through the orchard to the house, Mr. Blakely opened the coffin, held the knife to his wife's throat, and demanded she reveal the location of her financial documents and computer. VRP 646-49.

When thirteen year old Ralphy returned from school, his mother vainly tried to warn him away by banging on the box and yelling. VRP 650-51, 859. Mr. Blakely surprised

Ralphy, stepping out from behind a tree and threatening his son with a filet knife. VRP 857-58. Mr. Blakely warned his son that he was desperate, that Yolanda was in great danger, and that Ralphy should not give his father any trouble. Id. Ralphy and Yolanda spoke to each other through the walls of the coffin. VRP 859-60. While collecting his things, Ralphy looked for a gun to rescue his mother, but could not find one. VRP 861-62. Mr. Blakely ordered his young son to follow the pickup in his mother's car and threatened to kill Yolanda by blowing a hole through the coffin with a shotgun if Ralphy "tried anything." VRP 862.

Ralphy tried to get help at a gas station. VRP 869. He managed to escape, but Mr. Blakely drove off eluding police through three states, with Yolanda trapped in the coffin. VRP 869-71. Mr. Blakely did not check on her welfare to see if she was able to breathe. VRP 673-74. While Mr. Blakely sat in a heated cab, he had to be reminded that his wife was cold while she lay trapped in a coffin in the pickup bed in the middle of a cold autumn night. VRP 721-22. When Mr. Blakely released his wife from the coffin-like box after four-plus hours, he would not untie her hands so she could pull down her pants to relieve herself. VRP 659. Once in the cab, Yolanda was trapped in a corner of the seat between boxes with her legs curled up despite varicose veins. VRP 660-61. Mr. Blakely kept the knife next to the steering wheel as a constant threat. VRP 660. Although Mr. Blakely kidnaped his wife in the afternoon and drove with her through the night and into the next morning, throughout the whole ordeal he provided her with only half of a banana. VRP 723. At various times, he put his wife back in the coffin while he refueled, changed a tire, and made a telephone call. VRP 665-69.

Once they arrived in Montana, Mr. Blakely hid from police at his neighbor Mary Gillespie's house. VRP 670-72. There he demanded his wife sign over her property and litigation rights, and he engaged in business over the phone with his stockbroker.[2] VRP 679-83. He made frequent phone calls to his live-in girlfriend of two and a half years, Ilse Barros. VRP 678. He secreted his wife's most important financial files at Ms. Gillespie's house (which were discovered two months later during a home renovation). VRP 688. Eventually Ms. Gillespie escaped the house and alerted police. VRP 676. Federal agents arrested Mr. Blakely on October 27, 1998. VRP 684.

B. PROCEDURAL HISTORY

On October 27, 1998, the Petitioner Howard Ralph Blakely was charged with the first degree kidnapings of his wife Yolanda Blakely and thirteen year old son Ralphy Blakely. CP 1-6.

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[2] Please note the Petitioner characterizes the crimes as an attempt to reunite the family. Petition at 4. A single physician (not three) reported that Mr. Blakely (not any physician) had excused his crimes in this way. VRP 756. In a different version, Mr. Blakely accused his wife of inviting him to violate the restraining order and of poisoning him upon his arrival at the orchard such that he has no memory of events. VRP 1045. The victim's account of Mr. Blakely's deliberate thought process throughout the ordeal and the premeditated fashion in which he handbuilt a coffin to his wife's measurements contradict this story. The trial judge did not subscribe to the reunion explanation. VRP 1051-53. " . . . Mr. Blakely was not trying as a principal goal to reunite his family . . . His first overtures were you've got to terminate the trust litigation." VRP 1052-53.

After multiple and lengthy evaluations at Eastern State Hospital, doctors determined that while Mr. Blakely had been diagnosed at various times as schizophrenic, he only sought psychiatric treatment when embroiled in legal issues. VRP 242, CP 70. In fact, the doctors determined Mr. Blakely was malingering and had never been a paranoid schizophrenic. VRP 214, 244-45, 250-62; CP 70. Ultimately he was diagnosed as a narcissist. VRP 261, CP 70. In April 2000, Mr. Blakely received a jury trial on the issue of competency. The jury found him competent and Mr. Blakely proceeded to trial. VRP 345-48.

After a jury had been selected, Mr. Blakely requested the court accept a change of plea and dismiss the jury. VRP 515-27, VRP July 31, 2000 at 15. On July, 2000, Mr. Blakely pled guilty to one count of second degree domestic violence kidnaping of his wife with a deadly weapon enhancement and one count of second degree domestic violence assault of his son. CP 494-502. After a three day sentencing hearing, the trial court imposed an exceptional sentence of 90 months (i.e., 7½ years) on the kidnaping charge to run concurrent with a standard sentence of 14 months on the assault charge. VRP 566-1054, CP 608-633. Washington state law provides for maximum sentences as well as standard ranges. WASH. REV. CODE § 9A.20.010 (2002); WASH. REV. CODE § 9A.20.021 (2002); WASH. REV. CODE § 9.94A.505-35 (2002). Second degree kidnaping without a finding of sexual motivation is a class B felony. WASH. REV. CODE § 9A.40.030(3) (2002). The maximum sentence for a class B felony is ten years. WASH. REV. CODE § 9A.20.021(b) (2002).

The court's exceptional sentence was based on Mr. Blakely's deliberate cruelty in "repeatedly and protractedly confining his victim in a coffin-like box" and on the

fact that the crime occurred "within sight and sound of the victim's and defendant's minor child." CP 608-633, VRP 1047-53. See WASH. REV. CODE §§ 9.94A.535(2)(a) and (h)(ii) (2002).

On direct appeal, Mr. Blakely argued the exceptional sentence violated the holdings of *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct 2348, 147 L.Ed.2d 435 (2000). The Court of Appeals affirmed the sentence on the single aggravating circumstance of commission within sight or sound of a minor child. *State v. Blakely*, 111 Wash. App. 851, 869-70, 47 P.2d 149, 158-59 (2002). The court noted that the Washington Supreme Court has held that an exceptional sentence above the standard range but below the legislative maximum does not implicate *Apprendi* and does not require a jury trial to determine sentencing factors beyond reasonable doubt. *State v. Gore*, 143 Wash.2d 288, 311-15, 21 P.3d 262 (2001). The Washington Supreme Court denied review.

The Petitioner has requested this Court's review, claiming a conflict between the states.

REASONS FOR DENYING THE WRIT (ARGUMENT)

In *Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S.Ct. 2348, 2362-63, 147 L.Ed.2d 435 (2000), this Court held that a fact which increases the penalty for a crime beyond the statutory maximum must be submitted to a jury and proven beyond reasonable doubt. While adopting the same language, the Petitioner argues that the maximum sentence prescribed by the Washington State legislature is the upper limit of the standard range, or 53 months

in his case. Petition at 11. While the Petitioner avers his claim is "indisputable," the argument has been repudiated by the ultimate espositor of Washington law in *State v. Gore*, 143 Wash.2d 288, 21 P.3d 262, 277 (2001). The Petitioner's proposed extension of the *Apprendi* principle undermines the intent of the legislature, the value of sentencing ranges and guidelines, and the authority of the state courts in interpreting state law.

A. THE WASHINGTON STATE SUPREME COURT'S DETERMINATION THAT THE HIGH END OF A SENTENCING GUIDELINE IS NOT THE STATUTORY MAXIMUM SENTENCE IS BINDING ON THIS COURT.

Mr. Blakely pled guilty to two class B felonies. The legislative maximum sentence for a class B felony is ten years.[3] WASH. REV. CODE § 9A.20.021(1)(b). The trial court told Mr. Blakely that he could receive a statutory maximum sentence. CP 495; *State v. Gore*, 143 Wash.2d 288, 315, 21 P.3d 262, 277 (2001).

The Petitioner argues that this Court should extend *Apprendi* to treat the upper limit of the sentencing guidelines as the legislative maximum sentence. However, such an interpretation is clearly contrary to legislative intent. WASH. REV. CODE § 9.94A.505(5) (2002) (directing that the statutory maximum is provided in WASH. REV. CODE § 9A.20); WASH. REV. CODE § 9.94A.535 (2002) ("An exceptional sentence

[3] In stark contrast to amici's alarmist argument, the Washington legislature has not enacted a statute that results in maximum sentences of life for all non-capital felonies. The maximum sentence in this case was ten years, a meaningful upper limit for class B felonies.

imposed on an offender sentenced under RCW 9.94A.712 shall be to a minimum term set by the court and a maximum term equal to the statutory maximum sentence for the offense of conviction under chapter 9A.20 RCW."); WASH. REV. CODE § 9A.20.021 (2002) (providing the maximums). The Sentencing Reform Act (SRA) allows for exceptional sentences, delineating detailed guidelines. These maximums have existed for decades. Accordingly, they cannot fairly be characterized as an avoidance or subterfuge of the *Apprendi* ruling through labeling. See Petition at 13. The statute declares the purpose of the SRA is *not* to eliminate the court's discretion. WASH. REV. CODE § 9.94A.010 (2002).

The Washington Supreme Court has recognized that WASH. REV. CODE § 9A.20.021 provides the legislative maximums. *State v. Gore*, 143 Wash.2d at 315, 21 P.3d at 277. The state supreme court's construction of state law is authoritative. *Mullaney v. Wilbur*, 421 U.S. 684, 691, 95 S.Ct. 1881, 1886, 44 L.Ed.2d 508 (1975). This court definitively determines what is the "prescribed statutory maximum." *Apprendi*, 530 U.S. at 490, 120 S.Ct. at 2363.

B. THE SENTENCING REFORM ACT CHANNELS JUDICIAL DISCRETION FOR TYPICAL (STANDARD RANGE) AND ATYPICAL (EXCEPTIONAL) OFFENSES.

The Sentencing Reform Act or SRA enacted in 1981 created sentencing grids or matrices to standardize sentences and decrease sentence disparity throughout the state. Lisa K. Strom, *Exceptional Sentencing in Washington After State v. Freitag: Pushing the Limits of the Sentencing Reform Act*, 70 WASH. L. REV. 563, 564 (1995).

Before the SRA was enacted, sentencing courts and the parole board essentially had unbridled discretion in setting the length of the sentences. Seth A. Fine & Douglas J. Ende, *Washington Practice* Vol. 13B, § 3402-03 (2d ed.1998). Judges tended to sentence every defendant convicted of a felony to the statutory maximum. 70 WASH. L. REV. at 565. However, this was a maximum only. After a minimum term was served, the parole board or other penal authority could reduce or terminate the sentence in consideration of proof of rehabilitation. Id. Thus, for the crime of first degree rape, a defendant could receive any where from three years to life. WASH. REV. CODE § 9A.44.045 (2002). This system lacked public accountability, lacked predictability, and was subjective – based on the prisoner's personal characteristics rather than the facts of the particular crime. 70 WASH. L. REV. at 565. "In one case, a robber might receive probation; in the next, a shoplifter might go to prison. There was also the danger that sentences could reflect the judge's unconscious racial or gender biases." *Washington Practice* Vol. 13B, § 3404.

With the SRA, for the first time the defendant could make a meaningful prediction about his or her sentence. *Washington Practice* Vol. 13B, § 3401. It changed the focus of sentencing from "rehabilitation to proportionality, equality, and justice." *State v. Barnes*, 117 Wash.2d 701, 710, 818 P.2d 1088, 1092 (1991). When sentences are proportionate to the crime and equal from offender to offender, they promote respect for the law by doling out just desserts. WASH. REV. CODE § 9.94A.010 (2002). Beyond sentencing, the SRA had a profound impact on plea negotiations and trial strategy. *Washington Practice* Vol. 13B, § 3401.

A Washington court is now bound to the sentencing grids with five exceptions. *Washington Practice* Vol. 13B, § 3405 (Supp. 2003). One of these exceptions, pertinent to the instant matter, is that the court may order an exceptional sentence up or down for "substantial and compelling reasons." WASH. REV. CODE § 9.94A.535 (2002). Because no two crimes or criminals are alike, and because not all aspects of a crime can be accurately reflected in a numerical score, the flexibility provided by an exceptional sentence is proper. Such a sentence must be supported by written findings and conclusions and, unlike a standard range sentence, is appealable. Id. The statute permits the court's discretion so long as the sentence does not go above the statutory maximum or is "clearly excessive" or "clearly too lenient." WASH. REV. CODE §§ 9A.20.021 and 9.94A.585(4) (2002).

Rather than serving as a statutory limit on the judge's sentencing authority, the purpose of the standard range is to provide some uniformity in sentencing for those who commit a "typical" offense. *State v. Xaviar*, 117 Wash. App. 196, 206, 69 P.3d 901, 906 (2003); *State v. Flores-Moreno*, 72 Wash. App. 733, 744-45, 866 P.2d 648, 654 (1994). The SRA "structures, but does not eliminate, discretionary decisions affecting sentences," ensuring that the punishment is commensurate with the crime and with similarly situated offenders.[4] WASH. REV. CODE § 9.94A.010 (2002).

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[4] The policy of the SRA is consistent with the mission statement of amicus curiae Families Against Mandatory Minimums, which advocates that "the punishment should fit the crime and culpability of the offender." The details of Mr. Blakely's crime are neither "typical" nor deserving of a standard range sentence.

The development of the SRA is not dissimilar from sentencing reform throughout the country. Sentencing has moved from fixed terms, to judicial discretion within a permissible range, to standards which channeled the judge's discretion within and without of the range. *Harris v. United States*, 536 U.S. 545, 558, 122 S.Ct. 2406, 2414-15, 153 L.Ed.2d 524 (2002). "The Court has recognized that this process is constitutional – and that the facts taken into consideration need not be alleged in the indictment, submitted to the jury, or proved beyond a reasonable doubt. . . . Judicial factfinding within the course of selecting a sentence within the authorized range does not implicate the indictment, jury trial, and reasonable-doubt components of the Fifth and Sixth Amendment." *Id.*

C. WASHINGTON COURTS FOLLOW THIS COURT'S PRECEDENT.

In *State v. Gore*, the Washington Supreme Court relied significantly on *McMillan v. Pennsylvania*, 477 U.S. 79, 106 S.Ct. 2411, 91 L.Ed.2d 67 (1986). *State v. Gore*, 143 Wash.2d at 312, 21 P.3d at 276. In *McMillan*, this Court held that "there is no Sixth Amendment right to jury sentencing, even where the sentence turns on specific findings of fact." *McMillan*, 477 U.S. at 93, 106 S. Ct. at 2420. Law that "neither alters the maximum penalty for the crime committed nor creates a separate offense calling for a separate penalty" but "operates solely to limit the sentencing court's discretion within the range already available to it" withstands an *Apprendi* challenge. *McMillan*, 477 U.S. at 87-88, 106 S.Ct. at 2417. *Apprendi* did not overrule *McMillan*. *Harris*, 536 U.S. at 557-68, 122 S.Ct. at 2414-20.

On February 4, 2003, this Court denied certiorari on this identical issue and argument. *Buchanan v. Washington*, __ U.S. __, 123 S.Ct. 1266, 154 L.Ed.2d 1036, 71 U.S.L.W. 3548 (2003). The State's brief in the Buchanan matter relied heavily on *Harris v. United States*, 536 U.S. 545, 122 S.Ct. 2406, 153 L.Ed.2d 524 (2002) and *McMillan v. Pennsylvania*, 477 U.S. 79, 106 S.Ct. 2411, 91 L.Ed.2d 67 (1986).

In *Harris v. United States*, the Supreme Court indicated that it "prefers to avoid a broad interpretation of [the *Apprendi*] decision." *The Supreme Court, 2001 Term, Leading Cases*, 116 HARV. L. REV. 200, 230, 238 (2002). Upholding *McMillan v. Pennsylvania*, the *Harris* Court explained that prosecutors must prove to a jury beyond reasonable doubt *only those elements that the authors of the Bill of Rights would have considered to be elements of a separate crime*. *Harris v. United States*, 536 U.S. at 557, 122 S.Ct. at 2414. On the other hand, sentencing factors "have been the traditional domain of judges; they have not been alleged in the indictment or proved beyond a reasonable doubt. There is no reason to believe that those who framed the Fifth and Sixth Amendments would have thought of them as the elements of the crime." *Harris v. United States*, 536 U.S. at 560, 122 S.Ct. at 2416.

The clear question for any court in applying the ruling of *Apprendi* is given in *Harris*. Is the reason for the enhanced sentence due to an offense element or a sentencing factor? In *Harris v. United States*, this Court held that "not all facts affecting the defendant's punishment are elements." *Harris*, 536 U.S. at 549, 122 S.Ct. at 2410. The *Harris* analysis looks to the structure of the statute to determine whether the enhancement looks more like a

typical element of the crime or a traditional sentencing factor. *Harris*, 536 U.S. 552, 122 S.Ct. at 2411.

Applying this analysis to Mr. Blakely's exceptional sentence, the sentencing factors prove to be sentencing factors in truth and not just by label. The Washington statute lists most crimes in WASH. REV. CODE Title 9A, including kidnaping and assault. WASH. REV. CODE §§ 9A.40.030 & 9A.36.021 (2002). Title 9A also sets forth the statutory maximum penalties. WASH. REV. CODE § 9A.20.021. Felony sentencing, however, is set out in a different title, WASH. REV. CODE § 9.94A, the Sentencing Reform Act. In this chapter, the legislature authorizes exceptional sentences and provides illustrative mitigating and aggravating factors. WASH. REV. CODE § 9.94A.535 (2002).

Next, the *Harris* court looked to "critical textual clues" and past practice in which the enhancement may have been treated as an element. *Harris*, 536 U.S. 553, 122 S.Ct. at 2412. "Traditional sentencing factors often involve either characteristics of the offender or special features of the manner in which a basic crime was carried out." *Castillo v. United States*, 530 U.S. 120, 126, 120 S.Ct. 2090, 2094, 147 L.Ed.2d 94 (2000). The mitigating and aggravating factors for exceptional sentences in WASH. REV. CODE § 9.94A.535 embody the *Castillo* definition, and are integral to the fabric of the SRA. Because this section is integral to the SRA's structure, it cannot be said that the enhancement factors alter a defendant's punishment in a manner not usually associated with sentencing factors.

In Mr. Blakely's appeal, the Washington Court of Appeals *declined* to affirm the sentence on the basis of deliberate cruelty. *State v. Blakely*, 111 Wash. App. 851,

869, 47 P.2d 149, 158 (2002). The court affirmed the sentence on the uncontested domestic violence aggravating factors alone. *Id.* Domestic violence, e.g., the fact of commission within sight or sound of a minor child, is not an actual or traditional element of kidnaping or assault. Clearly the aggravating factors regard the relationship of the defendant to his victims and "special features of the manner" in which he carried out his crimes.

The Washington Supreme Court has held that

> aggravating factors neither increase the maximum sentence nor define a separate offense calling for a separate penalty. . . . The state statutory scheme permits a judge to impose an exceptional sentence – still within the range determined by the Legislature and not exceeding the maximum – after considering the circumstances of an offense, and, as *McMillan* and *Apprendi* indicate, it may do so without the factual determinations being charged, submitted to a jury, or proved beyond a reasonable doubt.

State v. Gore, 143 Wash.2d 288, 314, 21 P.3d 262, 277 (2001). The ruling conforms with this Court's precedent.

D. FEDERALISM PERMITS A CONFLICT OF LAWS.

The Petitioner argues that there is a "split of authority," a division between the states' highest courts. Petition at 7. The Petitioner sets forth that four states with similar sentencing systems have addressed the question of whether the standard range defines the statutory maximum. Petition at 8-9. Illinois, Minnesota, and Washington courts have resolved that exceptional sentences below the legal maximum but above the standard range do not implicate the *Apprendi* jury requirement. Id.

The Petitioner reports that a single court, the Kansas Supreme Court, has interpreted its state laws differently – to extend the jury requirement to exceptional sentences *by finding* that the upper limit of the presumptive range is the statutory maximum. *State v. Gould*, 271 Kan. 394, 23 P.3d 801 (2001). On this procedural issue, the Kansas court has chosen to ignore the legislative maximum penalties established under Kan. Stat. Ann. § 21-5401 (2003). *State v. Gould*, 271 Kan. at 410-11, 23 P.3d at 813. A state court's interpretation of a statute "puts these words in the statute as surely as if it had been so amended by the legislature." *Winters v. New York*, 333 U.S. 507, 68 S.Ct. 665, 669, 92 L.Ed.2d (1948).

The so-called split of authority regarding the interpretation of different laws in different states is an illusory dilemma under the federalism principle. Any state is free to legislate differently from any other so long as the law does not contravene a power delegated to the federal government. U.S. Const. amend. X. The supreme courts of each state are the "ultimate expositors" of those state laws, and their construction of state law is authoritative. *Mullaney v. Wilbur*, 421 U.S. 684, 691, 95 S.Ct. 1881, 1886, 44 L.Ed.2d 508 (1975). The Kansas Supreme Court is the final arbiter of the statutory maximum penalty under Kansas law; and the Washington Supreme Court is the final arbiter of the statutory maximum penalty under Washington law.

Because the two courts interpret two different state laws to be different, the laws defining statutory maximums *are* different. Under the U.S. Constitution and under *Apprendi*, this "conflict" is neither problematic nor deserving of this Court's concern.

E. JURY FINDINGS ARE UNLIKELY TO ALTER THIS SENTENCE.

The Petitioner contends that the instant case is an ideal vehicle for review, because a jury would be unlikely to find beyond reasonable doubt the "hotly disputed" factors which support the exceptional sentence. The argument fails, because the factors are undisputed.

The Petitioner argues that, based upon Mr. Blakely's mental condition, it would be unlikely that a jury would find Mr. Blakely guilty beyond a reasonable doubt of *deliberate cruelty*. This argument fails for two reasons.

First, the Washington Court of Appeals affirmed the sentence based *only* upon the domestic violence factors. *State v. Blakely*, 111 Wash. App. 851, 869, 47 P.2d 149, 158 (2002). The Court of Appeals did *not* rely upon a finding of deliberate cruelty under WASH. REV. CODE § 9.94A.535(2)(a). *Id.*

Second, in an unusual procedure, a jury determined Mr. Blakely's mental condition. The jury heard testimony from the state's witnesses Dr. Verne Cressey and Dr. William Fredrickson. Dr. Cressey had examined Mr. Blakely in 1987. VRP 184. Both doctors examined Mr. Blakely over several months in 1999. VRP 186, 190, 243, 277, 280. They concluded Mr. Blakely had personality disorders (antisocial/narcissistic), but had never been schizophrenic. VRP 258-62, 290. Dr. Cressey explained that private doctors generally treat patients who genuinely seek treatment. VRP 250-53. Accordingly, they are less vigilant or familiar with the criminal impetus toward malingering or faking, often overlooking this diagnosis, as happened with Mr. Blakely. Id. Mr. Blakely's history indicates that he only sought psychiatric treatment as a

means of escaping legal responsibility. *Blakely*, 111 Wash. App. at 858, 47 P.2d at 153. Dr. Paul Wert, the expert witness hired by the defense, switched sides after a final interview with the Defendant and testified that Mr. Blakely was competent. VRP 165-66, 173-75. Mr. Blakely was unable to maintain a consistent performance in court, and at post-conviction hearing the trial court noted that Mr. Blakely's act was undermined by the savvy content of his whispers "loud enough to be heard at the bench." VRP July 31, 2000 at 16. The jury found Mr. Blakely competent. VRP 345-48.

When considering Mr. Blakely's mental condition under the full and fair context of the record, it is safe to say that a jury would not have been "hard pressed" to find Mr. Blakely's remorseless malingering with antisocial, misogynistic, and narcissistic components aggravated, not mitigated, the offenses. Diagnosed as malingering, Mr. Blakely alternately argued he had no memory of events or that he had intended to reunite the family. However, there was substantial evidence that Mr. Blakely was aware of the wrongfulness of his actions at the time of their commission (VRP 636, 659, 660, 679, 730, 735, 858, 870) and that his motivation was financial and not conciliatory (VRP 634, 636, 640, 646-49, 677-83, 687-88). Mr. Blakely maintained a girlfriend after separation from his wife and called Ms. Barros throughout the kidnaping to reassure her (VRP 678), never once suggesting reconciliation with his wife (VRP 719).

Deliberate cruelty is manifest in multiple, inescapable facts extraneous from the elements of kidnaping: the homemade coffin tailored to Mrs. Blakely's measurements; the multiple weapons used to threaten the victims; threats to kill; slicing Mrs. Blakely's nostrils and throat with a

knife; threatening each victim with the harm of the other; forcing a thirteen year old to drive cross country back roads in the dark; threatening to hire hitmen; the denial of food, water, and warmth; the confinement in extremely close areas; humiliation of Mrs. Blakely when she needed to relieve herself; demanding information on adult children who had finally escaped their father's terrorism; violating a restraining order; theft of the family's financial resources; violation of Mrs. Blakely's litigation rights; the interstate element which added to Mrs. Blakely's sense of powerlessness; and the history of dehumanization, incapacitation, and brutalization of Mrs. Blakely's person and spirit throughout her marriage. The trial court held that "any reasoning person" would find Mr. Blakely's acts to be "not only cruelty, but deliberate cruelty." VRP July 31, 2000 at 41.

The Petitioner argues that Mr. Blakely's motion to withdraw his guilty plea was motivated by the court's exceptional sentence. Petition at 5, 18. This is not borne out by the record. In fact, the court did not sentence Mr. Blakely until *after* the motion to withdraw plea was heard. Mr. Blakely argued that his plea was involuntary due to lack of sleep and duress from his own counsel. VRP July 31, 2000 at 3. The court heard and denied the motion on July 31, 2000. VRP July 31, 2000 at 2-18. On that same day, but after this determination of the motion, the court proceeded to hear Mrs. Blakely's victim impact statement for the first time. VRP July 31, 2000 at 23-36. The court then sentenced Mr. Blakely. VRP July 31, 2000 at 42. On October 4, 2000, Mr. Blakely made a second motion to withdraw plea. VRP 583. The second motion argued that the State breached the plea agreement by responding to the defense motion for a standard range sentence and

supporting the court's authority to sentence outside the standard range. VRP 584. The court denied this motion as well and only then proceeded to the three day evidentiary hearing for sentencing. VRP 586-87.

The Petitioner argues that the exceptional sentence was "based on additional facts that Petitioner hotly disputed." Petition at 18. This is also unsupported by the record. Mr. Blakely's entire defense was incapacity, and not denial of the multiple facts that evinced deliberate cruelty. Those facts are *undisputed*. In cross-examination, defense counsel did not suggest that the details of the crime were fabricated. The incapacity argument is waived by guilty plea. A jury determined competency.

The fact that the crimes were committed within sight or sound of Ralphy Blakely, then 13 years old, is also *undisputed*. *State v. Blakely*, 111 Wash. App. 851, 869, 47 P.2d 149, 158 (2002). See also VRP 872-74 for the entire cross-examination of Ralphy Blakely which does not dispute the child's presence. The trial court held that "Mr. Blakely not only forcibly kidnaped his estranged wife and did it in the deliberately cruel way that I indicated, but put his son in the position of frantically reporting that to anyone he could notify. To watching it happen. That circumstance must forever imprint and distort the way that this child will think of his parents. Both of his parents." VRP July 31, 2000 at 42. The trial court ruled that "[t]here is no question on the evidence before me that this act occurred and was designed to occur within the sight or sound of Ralphy, the child of these parties." VRP 1048. Should the Petitioner now for the first time dispute this fact in violation of procedure, the State could call the various witnesses at the gas station where the child escaped and begged bystanders for assistance. There

would be no difficulty in proving this fact beyond reasonable doubt. Based on the child's report and the reports of multiple witnesses at the gas station, law enforcement was dispatched over three states to find Mr. Blakely and rescue Mrs. Blakely.

Because it is unlikely that a jury's finding would alter the sentence, the Petitioner's arguments fail.

F. THE EXTENSION OF *APPRENDI* PROPOSED BY THE PETITIONER IS CONTRARY TO PUBLIC POLICY.

The Petitioner advocates extending the *Apprendi* requirement of jury findings to any sentence that exceeds the standard range. The Petitioner contends that the extension of *Apprendi* advocated "is of great importance." Petition at 15. Many states have sentencing guidelines like those in Washington state. Petition at 16. Therefore, the extension of *Apprendi* would have far-reaching impact. It would not, however, affect federal sentencing, because federal guidelines are promulgated by a judicial sentencing commission and not by legislative act. Petition at 17; Amici Brief at 3. Therefore, extending *Apprendi* to sentences over the standard guideline but below the legislative maximum, as the Petitioner proposes, would unequally impact the states, disabling state guidelines while preserving federal ones. It is poor policy to conflate guidelines with maximums in order to unequally burden states with the costs of jury findings.

Professor Erwin Chemerinsky of USC Law School has explained that "the central premise of *Apprendi* is that it is wrong to convict someone of one crime, and sentence them for another," quoted in David E. Rovella, *A Looming*

'Apprendi' Tsunami?, NAT'L L. J. (January 2, 2001). In *Apprendi*, the hate crime motive "triggered" a provision or separate law which allowed a greater sentence than the maximum. However, not every enhancement factor triggers a separate crime or a sentence beyond the maximum. In Mr. Blakely's case, the court's finding that the crimes were committed within sight and sound of the Blakely's child and that they were committed with deliberate cruelty toward family or household members did not trigger a separate law or crime. The crime remained the same. And the sentence maximum remained the same.

The *Apprendi* issue is distinctly procedural. *Apprendi v. New Jersey*, 530 U.S. 466, 488, 120 S.Ct. 2348, 2362, 147 L.Ed.2d 435 (2000); *United States v. Montalvo*, 331 F.3d 1052, 1061 (9th Cir. 2003). Notice and predictability are material. Under the SRA, a defendant has both. Mr. Blakely had notice that the court could sentence outside the standard range and that the maximum sentence for his crimes was ten years. This notice was clear in the plea agreement (CP 495) and the statute (WASH. REV. CODE § 9A.20.021). The statute lists various aggravating factors. WASH. REV. CODE § 9.94A.535 (2002). Although the list is not exhaustive, the trial court did not go outside it. The court found that Mr. Blakely involved his minor child in his acts of violence and that the domestic violence kidnapings were accomplished with deliberate cruelty. Mr. Blakely had notice of these facts in discovery and notice that these facts would not be hidden from the court. The statute gave Mr. Blakely notice that the court would hear from the victims, law enforcement, and the Department of Corrections before sentencing. WASH. REV. CODE § 9.94A.500(1) at para. 4 (2002). The trial court sentenced Mr. Blakely to a term *less* than ten years.

Traditionally, sentencing courts have fought the imposition of standard ranges, jealous of their discretion. However, standard ranges/guidelines provide defendants with an extra measure of predictability or assurance. Due to these ranges, defendants know that their sentences will not vary wildly depending on the judge and that the judge's discretion is checked by clear guidelines. WASH. REV. CODE § 9.94A.585 (2002). They can trust that exceptional sentences must be supported on the record and are appealable. Id.

If this Court were to find that the upper limit of these guidelines was in fact the statutory maximum, despite clear and long established legislative intent to the contrary, the legislature may balk. The costs of calling in a jury every time a court finds exceptional or mitigating factors is prohibitive. Extending *Apprendi* to exceptional sentences is inefficient and costly, forcing the cost of a jury and lengthy evidentiary hearing even when the defendant pleads guilty. It reduces the administrative benefits of a plea, therefore reducing the state's incentive to negotiate a plea. The legislatures are likely to respond by raising the upper limits of the ranges or abolishing them altogether. "[A] few academics warn there may be a backlash to *Apprendi* in the states, where legislatures may seek to avoid the ruling's constraints by rewriting their criminal statutes to include Draconian maximum sentences as cover for sentencing enhancements." David E. Rovella, *A Looming 'Apprendi' Tsunami?*, NAT'L L. J. (January 2, 2001).

The likely outcome of such an extension of *Apprendi* would not benefit defendants. It would discourage the state from offering plea deals and encourage the legislature to write out standard ranges, a result inconsistent

with the concerns of this Court for clear sentencing standards.

CONCLUSION

Based upon the forgoing, Respondent respectfully requests this Court deny the petition for writ of certiorari.

Respectfully submitted,

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September 12, 2003